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No. 92-1276

In The

Supreme Court of the United States

October Term, 1992

CHARLES J. REICH,

Petitioner,

v.

MARCUS E. COLLINS and THE GEORGIA DEPARTMENT OF REVENUE,

Respondents.

Petition For Writ Of Certiorari To The Supreme Court Of Georgia

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

WARREN R. CALVERT
Senior Assistant Attorney General
(Counsel of Record for Respondents)

MICHAEL J. BOWERS
Attorney General

DANIEL M. FORMBY
Senior Assistant Attorney General

Attorneys for Respondents

Georgia Department of Law
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3370

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OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

1. Whether this Court should grant certiorari to determine if Due Process requires the State of Georgia to refund income taxes voluntarily paid on federal retirement benefits before this Court's decision in *Davis v. Michigan*, 489 U.S. 803 (1989), for years when state retirement benefits were exempt from taxation in Georgia, where petitioner failed to properly raise this argument below.

2. Whether this Court should grant certiorari to determine if the Supreme Court of Georgia, by construing Georgia's income tax refund statute to be inapplicable to taxes paid under a law later held invalid, deprived the petitioner of a statutory right to such a refund, in violation of Due Process.

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MARCUS E. COLLINS and THE GEORGIA DEPARTMENT OF REVENUE,

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Petition For Writ Of Certiorari To The Supreme Court Of Georgia

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents in the above-styled action respectfully oppose the Petition for Writ of Certiorari to the Supreme Court of Georgia. The first question presented by the petition was not properly raised below. In addition, both questions concern issues to which this Court has already spoken, and which the Court has resolved against the position of the petitioner here. Accordingly, Respondents request that the petition be denied.

CITATION TO OPINION BELOW

The opinion of the Georgia Supreme Court is officially reported at 262 Ga. 625 (1992), and is unofficially reported at 422 S.E.2d 846 (1992). In addition, the text of the opinion is included as Appendix A to the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

On March 28, 1989, this Court ruled in *Davis v. Michigan*, 489 U.S. 803 (1989), that income tax statutes in Michigan, which provided for the taxation of federal retirement benefits but exempted retirement benefits paid by the state and its political subdivisions, violated 4 U.S.C. § 111 and principles of intergovernmental tax immunity. At the time of the *Davis* decision, Georgia's income tax statutes totally exempted pension income received from the Employees' Retirement System of Georgia, the Teachers Retirement System of Georgia, and certain other retirement systems, *see* O.C.G.A. § 48-7-27(a)(4) (1982), but did not afford the same treatment to federal retirement benefits. In response to *Davis*, the Georgia General Assembly, during special session in September 1989, amended Georgia's law to provide identical treatment for federal, state, and private pensions, for the tax years 1989 and forward. *See* O.C.G.A. § 48-7-27(a)(5) (Supp. 1992).

Shortly after *Davis* was announced, Petitioner Charles J. Reich ("Colonel Reich" or "the taxpayer") filed refund claims with the Department of Revenue for Georgia income taxes which he had voluntarily paid on his military retirement benefits for the years 1985 through

1988. When the Department denied his claims, the taxpayer brought suit under O.C.G.A. § 48-2-35, contending that Georgia's taxation of such amounts violated the principles set forth in *Davis*, the Fifth and Fourteenth Amendments to the U.S. Constitution, and comparable provisions of the Georgia Constitution. Both the Respondents and the taxpayer subsequently filed motions for summary judgment.

In its final order, the trial court ruled that Georgia's pre-1989 income tax statute was legally indistinguishable from the statute considered in *Davis*. (Petition for Writ of Certiorari, Appendix C.) However, the trial court also determined, based on the three-part test set forth in *Chevron Oil v. Huson*, 404 U.S. 97 (1971), that *Davis* should not be applied retroactively to any tax years ending before the *Davis* decision was rendered, and that no refunds were due. The Georgia Supreme Court granted Colonel Reich's application for discretionary appeal. *See* O.C.G.A. § 5-6-35(a).

On November 19, 1992, the Georgia Supreme Court held that the state's pre-1989 income tax statutes violated the principles of *Davis*, and that this Court's decision in *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439 (1991), mandated retroactive application of *Davis*. However, the Georgia Supreme Court also determined that O.C.G.A. § 48-2-35, which provides for refunds of taxes "erroneously or illegally assessed and collected", did not apply to taxes paid under a law later held unconstitutional, and that Colonel Reich was therefore not entitled under that statute to the refunds he sought. The taxpayer's motion for reconsideration was denied on

December 17, 1992. The instant petition for certiorari was filed on January 29, 1993.

On pages 4 and 5 of his petition, the taxpayer refers to other litigation in which he was involved before the present action was commenced. The taxpayer refers to the earlier lawsuit as "an equitable action for refunds", and he attaches to his petition a copy of the trial court's order dismissing his complaint. (Petition for Writ of Certiorari, Appendix F.) The earlier action was not "an equitable action for refunds", as the taxpayer alleges. Moreover, if the prior lawsuit is at all material to the arguments which the taxpayer wants the Court to consider, then certiorari should be denied because the proceedings in that action are not a matter of record here.

SUMMARY OF ARGUMENT

Although the taxpayer frames his petition in terms of a single "Question Presented", he actually asserts two distinct legal arguments for this Court's review. The first – whether Due Process requires the State of Georgia to refund income taxes which he voluntarily paid on his federal retirement benefits before this Court's decision in *Davis v. Michigan*, 489 U.S. 803 (1989), even through pre-deprivation remedies were available under state law to contest such taxes prior to payment – was not raised by the taxpayer in the state court proceedings and was not addressed by the Georgia Supreme Court. It also concerns a legal issue which has already been answered by this Court in *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990). The taxpayer's second

argument – that the Supreme Court of Georgia, by virtue of its construction of Georgia's income tax refund provisions, deprived him of a statutory right to such a refund, in violation of Due Process – is based on the taxpayer's belief that a state court decision on a question of state law violates the Fourteenth Amendment if the decision reverses prior cases or is somehow "wrong". While the Respondents do not agree with the taxpayer's characterization of the Georgia Supreme Court's opinion, the general proposition on which the argument rests has been explicitly rejected by this Court, and certiorari need not be granted in order to reject the proposition again.

ARGUMENT

The taxpayer states the "Question Presented" as follows: "[W]hether a state violates the Due Process Clause when it collects taxes from its citizens in violation of the U.S. Constitution, provides its citizens a right to refunds for the unconstitutional taxation, and then eliminates the right to refunds after the time has run for any other relief." In fact, the taxpayer's petition advances two distinct legal arguments, neither of which is fairly reflected in the single question posed by the taxpayer. The taxpayer asserts that Due Process requires the State of Georgia to refund income taxes which he voluntarily paid on federal retirement benefits before this Court's decision in *Davis v. Michigan*, 489 U.S. 803 (1989), for years when state retirement benefits were exempt from taxation in Georgia, even though predeprivation remedies were available under state law to contest such taxes prior to

payment. *See* Petition for Writ of Certiorari, pp. 8-13. The taxpayer also maintains that the Georgia Supreme Court, by construing Georgia's income tax refund statute to be inapplicable to taxes paid under a law later held invalid, deprived him of a statutory right to such a refund, in violation of Due Process. Neither argument warrants a grant of certiorari in this case, for the reasons discussed below.

I. THIS COURT SHOULD NOT GRANT CERTIORARI TO DETERMINE IF DUE PROCESS REQUIRES THE STATE OF GEORGIA TO REFUND INCOME TAXES WHICH PETITIONER VOLUNTARILY PAID ON HIS FEDERAL RETIREMENT BENEFITS, WHERE PETITIONER FAILED TO PROPERLY RAISE THIS ARGUMENT BELOW

Assuming a federal question has been properly framed, it is essential that it be raised, presented, and pursued in a timely and proper manner at the appropriate point in the state court proceedings. *See Beck v. Washington*, 369 U.S. 541, 550-54 (1962). *See also Hill v. California*, 401 U.S. 797, 805 (1971), *citing Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969) (a federal claim cannot be considered by the Court unless it has been either raised in the state court or considered and resolved by the state court). According to the taxpayer, "[t]he . . . question sought to be reviewed . . . was not created until the November 19, 1992 decision of the Supreme Court of Georgia." Petition for Writ of Certiorari, p. 6. On pages 8 through 13 of his petition, however, the taxpayer argues a point that could have been, but was not, raised earlier: that Due Process itself provides a constitutional right to

the refunds sought, irrespective of any refund statute. Under the authorities above, this contention simply comes too late.

In any event, the argument that Due Process requires the State of Georgia to refund taxes which Colonel Reich voluntarily paid on his retirement benefits for years before *Davis*, even through predeprivation remedies were available under state law to contest such taxes prior to payment, is one which the Court's decision in *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990), quickly settles. Without dispute, Due Process may act as a restraint in state tax matters. As stated in *McKesson*,

> if a State places a taxpayer under duress promptly to pay a tax when due and relegates him to a postpayment refund action in which he can challenge the tax's legality, the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation.

Id. at 31 (footnotes omitted). Respondents respectfully submit that *McKesson* addresses only a state's Due Process obligation to return taxes collected under a statute which the state, from the date of the statute's enactment, knew or should have known was unconstitutional. Respondents also submit that the unconstitutionality of Georgia's tax treatment of federal retirees was anything but clear prior to *Davis*. *See* Brief for Respondent, *Harper v. Virginia Dep't of Taxation*, No. 91-794. For purposes of the instant petition, however, the Court need not concern itself with these arguments, because the Due Process

rights of the taxpayer here were not violated by the State of Georgia even under a broader reading of *McKesson*.

> [I]n order to satisfy the commands of the Due Process Clause[, the] State may choose to provide a form of "predeprivation process," for example, by authorizing taxpayers to bring suit to enjoin imposition of a tax prior to its payment, or by allowing taxpayers to withhold payment and then interpose their objections as defenses in a tax enforcement proceeding initiated by the State.

McKesson, 496 U.S. at 36-37 (footnotes omitted). "The availability of a predeprivation hearing constitutes a procedural safeguard against unlawful deprivation sufficient by itself to satisfy the Due Process Clause, and taxpayers cannot complain if they fail to avail themselves of this procedure." *Id.* at 38, n.21.

At least three distinct statutory methods exist whereby an individual can contest his Georgia income tax liability prior to payment. A taxpayer may, within 30 days of the issuance of an assessment against him, request a hearing under Georgia's Administrative Procedure Act. O.C.G.A. § 50-13-12. If he receives an adverse administrative decision, the aggrieved taxpayer may seek superior court review. O.C.G.A. § 50-13-19. After receiving a notice of assessment, a taxpayer may choose to forego an administrative hearing, appealing directly to the superior court for judicial review. O.C.G.A. § 48-2-59. A taxpayer may file an affidavit of illegality to any levy of execution and obtain a hearing in superior court on the underlying assessment. O.C.G.A. § 48-3-1.

See Gainesville-Hall County Economic Opportunity Organization, Inc. v. Blackmon, 233 Ga. 507, 212 S.E.2d 341 (1975); *Waldron v. Collins*, 788 F.2d 736, 738 (1986). In addition, if the statutory remedies are inadequate for any reason, the taxpayer can bring an equitable action to enjoin collection of an unconstitutional tax. *See generally Blackmon v. Golia*, 231 Ga. 381, 202 S.E.2d 186 (1973) (suit for injunctive relief to challenge constitutionality of alcohol tax statute). In providing such predeprivation remedies, the State of Georgia has done all that Due Process requires, even were Georgia's tax treatment of federal retirees clearly unconstitutional before *Davis*.

Nevertheless, the taxpayer here argues that Georgia's predeprivation remedies do not satisfy the Due Process standard articulated in *McKesson*. *See* Petition For Writ of Certiorari, pp. 11-12. There is no authority whatsoever for the taxpayer's claim that enforced collection action can properly be taken in Georgia against a person whose tax liability is already in court under either O.C.G.A. § 48-2-59 or O.C.G.A. § 48-3-1, and Georgia's APA expressly provides a means for staying enforcement of a tax assessment pending a final ruling in any action brought under that procedure. *See* O.C.G.A. §§ 50-13-12(c),-19(d). Colonel Reich's contention that Georgia's predeprivation remedies fail the *McKesson* Due Process test because a taxpayer pursuing such a remedy "is . . . subject to criminal prosecution" for nonpayment is also meritless. Petition For Writ of Certiorari, p. 12. A taxpayer with a bona fide dispute is not compelled "under duress" to forego a predeprivation remedy, within the meaning of *McKesson*, simply because a state official, acting unreasonably or in bad faith, *could* try to prosecute

for nonpayment of such taxes, where no actual threats or attempts to prosecute have been made.

Consequently, the taxpayer's Due Process objections to Georgia's predeprivation remedies distill down to the fact that an unpaid tax liability is subject to interest and possibly penalties. This contention trivializes *McKesson* and the cases upon which that decision is based. In *McKesson*, the Court observed that "Florida has . . . established[ed] various sanctions and summary remedies designed so that liquor distributors tender tax payments *before* their obligations are entertained and resolved," including the right to levy upon and sell property to recover unpaid taxes, and the right to revoke a delinquent taxpayer's license to do business in the state. *McKesson*, 496 U.S. at 38 (emphasis in original).

> As a result, Florida does not purport to provide taxpayers like petitioner with a meaningful opportunity to withhold payment and to obtain a predeprivation determination of the tax assessment's validity; rather, Florida requires the taxpayers to raise their objections to the tax in a post-deprivation refund action.

Id. at 38 (footnote omitted). By contrast, no decision has ever held that state provisions allowing interest or appropriate penalties[1] on delinquent liabilities would alone

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[1] Georgia's failure-to-pay penalty is not assessed "when . . . the failure is due to reasonable cause and not due to willful neglect." O.C.G.A. § 48-7-86(a)(2). Moreover, no penalties are imposed by the State Revenue Commissioner when "the default giving rise to the penalty was due to reasonable cause and not due to gross or willful neglect or disregard of the law or of

amount to "duress" for Due Process purposes, and thereby obligate the state to refund amounts voluntarily paid under a tax statute subsequently held unconstitutional. *Cf. Ward v. Love County,* 253 U.S. 17 (1920) (payment to prevent distress sale); *Union Pacific Railroad Co. v. Public Service Comm'n,* 248 U.S. 67 (1918) (non-payment of fee would have invalidated bonds issued by railroad); *Garr, Scott & Co. v. Shannon,* 223 U.S. 468 (1912) (non-payment would have forfeited right to do business); *Atchison, Topeka & Santa Fe Railway Co. v. O'Connor,* 223 U.S. 280 (1912) (forfeiture of right to do business). As a general rule,

> [w]here a party pays an illegal demand, with full knowledge of all the facts which render such demand illegal, without an immediate and urgent necessity therefor, or unless to release his person or property from detention, or to prevent an immediate seizure of his person or property, such payment must be deemed voluntary, and cannot be recovered back.

Railroad Co. v. Commissioners, 98 U.S. 541, 543-44 (1878). *Accord United States v. New York and Cuba Mail Steamship Co.,* 200 U.S. 488, 494 (1906). Respondents know of no predeprivation tax remedy, whether federal or state, that satisfies the Due Process "duress" test advocated by the taxpayer here, a test which is not supported by the *McKesson* decision or the cases upon which *McKesson* relied.

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regulations or instructions issued pursuant to law." O.C.G.A. § 48-2-43.

II. THIS COURT SHOULD NOT GRANT CERTIORARI TO DETERMINE IF THE GEORGIA SUPREME COURT, BY CONSTRUING GEORGIA'S INCOME TAX REFUND STATUTE TO BE INAPPLICABLE TO TAXES PAID UNDER A LAW LATER HELD INVALID, DEPRIVED THE PETITIONER OF A STATUTORY RIGHT TO SUCH A REFUND, IN VIOLATION OF DUE PROCESS

The taxpayer also argues that the Georgia Supreme Court, by virtue of its interpretation of O.C.G.A. § 48-2-35, has deprived him of a statutory right to the refunds he seeks, in violation of Due Process. Although not entirely clear, the taxpayer's contention seems based on his assertion that the Georgia Supreme Court has "torture[d] the plain language of the statute", ignoring prior case law "establish[ing] that this procedure was applicable to unconstitutional taxes." Petition for Writ of Certiorari, pages 14-15. Although the taxpayer's assertion in this respect is without legal significance, for reasons to be discussed, the cases cited by the taxpayer do not in any event support his claim of what the Georgia Supreme Court has supposedly done.

The taxpayer relies on three prior decisions of the Georgia Supreme Court in arguing that the court "[had] previously held that the refund statute applies to claims for refunds of unconstitutional taxes." Petition for Writ of Certiorari, pp. 9-10. In *Henderson v. Carter*, 229 Ga. 876, 195 S.E.2d 4 (1972), the Georgia Supreme Court affirmed the dismissal of a mandamus action seeking certain sales tax refunds because, among other reasons, the taxpayer had an adequate legal remedy under the refund statute. *Id.* at 880, 195 S.E.2d at 7. However, the plaintiff in that

case did not argue that the tax statute under which the disputed amounts had been paid was itself unconstitutional. Rather, the plaintiff asserted only "that *the refusal . . . to refund such moneys* amount[ed] to depriving the complainant . . . of [her] rightful property without due process of law." *Id.* at 877, 195 S.E.2d at 5 (emphasis added).

The case of *Wright v. Forrester,* 192 Ga. 864, 16 S.E.2d 873 (1941) did concern taxes collected under an allegedly unconstitutional law. The taxpayer pursued a refund claim under the predecessor of O.C.G.A. § 48-2-35, subsequently bringing a mandamus action under the refund statute to compel approval of his claim. *Id.* at 866, 16 S.E.2d at 874. The Georgia Supreme Court held merely that the refund statute did not provide for mandamus, affirming the trial court's dismissal of the complaint. In later litigation involving identical taxes, the Georgia Supreme Court found that the refund statute did not apply at all, because the disputed amounts were for periods prior to the statute's effective date. *Eibel v. Forrester,* 194 Ga. 439, 441, 22 S.E.2d 96, 98 (1942).

Finally, the Georgia Supreme Court's passing reference to the refund statute in *Collins v. Waldron,* 259 Ga. 582, 385 S.E.2d 74 (1989), set out in footnote 1 of the court's opinion, is dictum which does not have the precedential weight which the taxpayer attributes to it. The interlocutory appeal to the Georgia Supreme Court in that case, which was brought immediately after *Davis* was decided, concerned "an injunction issued by the [Richmond County] superior court on April 14, 1989, directing that [the state revenue commissioner] maintain an escrow fund for all payments of income taxes attributable to

federal pensions" pending a ruling on the constitutionality of Georgia's income tax scheme. *Id.* at 582, 385 S.E.2d at 74. By the time of the Georgia Supreme Court's decision, the legislature had amended Georgia's statutes to eliminate any disparity between state and federal retirees. Since the constitutionality of Georgia's new law was not in doubt, and since it was unlikely that the Revenue Department would still be receiving payments for tax years unaffected by the change, the Georgia Supreme Court found that the purpose for the injunction no longer existed, vacating the lower court's judgment.

The taxpayer would have no Due Process claim, however, even if he were correct in characterizing the opinion of the Georgia Supreme Court in this case as contrary to "clearly established precedent". An unforeseeable judicial enlargement of a criminal statute, applied retroactively, may violate a defendant's Due Process right "to fair warning of that conduct which will give rise to criminal penalties." *Marks v. United States*, 430 U.S. 188, 191 (1977). But in the civil context, "[n]o one has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit." *New York Central Railroad Co. v. White*, 243 U.S. 188, 198 (1917).

> Even if it be true . . . that the [state court] departed from earlier and well-established precedents to meet the exigencies of this case, whatever might be thought of the justice or wisdom of such a step, the Constitution of the United States is not infringed. . . . [T]he decision of a court upon a question of law, however wrong and however contrary to previous decisions, is not an infraction of the Fourteenth

> Amendment merely because it is wrong or because earlier decisions are reversed.

Patterson v. Colorado, 205 U.S. 454, 461 (1907). *Accord Tidal Oil Co. v. Flanagan*, 263 U.S. 444, 450 (1924) ("the mere fact that the state court reversed a former decision to the prejudice of one party does not take away his property without due process of law").

The case upon which the taxpayer appears largely to rely, *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673 (1930), is easily distinguished on its facts. The plaintiff in *Brinkerhoff* brought suit in Missouri to enjoin the collection of certain disputed taxes, using the only remedy which, according to settled state law, was available to contest such liabilities. After the trial court dismissed the plaintiff's complaint, an appeal was taken to the Missouri Supreme Court. The Missouri Supreme Court affirmed, holding that a suit in equity was improper because the plaintiff had not first exhausted an administrative remedy before the Missouri State Tax Commission. In so holding, the court overruled a prior decision that the administrative remedy could not be used in such cases. By this time, however, it was too late for the plaintiff to invoke the alternative procedure.

This Court reversed, stating that "[i]t is plain that the practical effect of the judgment of the Missouri court is to deprive the plaintiff of property without affording it *at any time* an opportunity to be heard in its defense." 281 U.S. at 678 (emphasis added).

> [U]ntil . . . the [Missouri Supreme Court's] opinion in the case at bar was delivered, the Tax Commission could not, because of [the Missouri Supreme Court's earlier decision], grant the

> relief to which the plaintiff was entitled on the facts alleged. After [the Missouri Supreme Court's opinion], the Commission could not grant such relief to this plaintiff because, under the decision of the court in this case, the time in which the Commission could act had long expired. Obviously, therefore, *at no time* did the State provide to the plaintiff an administrative remedy against the alleged illegal tax.

Id. at 679 (emphasis added). In the Court's view, "[i]f the judgment is permitted to stand, deprivation of plaintiff's property is accomplished without its *ever* having had an opportunity to defend against the exaction." *Id.* at 679. The Court was careful to point out, however, that "[s]tate courts, like this Court, may ordinarily overrule their own decisions without offending constitutional guaranties, even though parties may have acted to their prejudice on the faith of the earlier decisions." *Id.* at 681, n.8.

Because there were ample other procedures by which Colonel Reich might have contested the Georgia tax on his federal retirement benefits, this case is unlike *Brinkerhoff*, and the taxpayer is no better off than any litigant who "assume[s] the risk that the ultimate interpretation by the highest court [of any particular procedure] might differ from [his] own." *Brinkerhoff*, 281 U.S. at 682, n.9. The taxpayer's Due Process attack on the Georgia Supreme Court's interpretation of O.C.G.A. § 48-2-35 is without merit.

CONCLUSION

Review on writ of certiorari is a matter of judicial discretion and should be granted only when there are

special and important reasons for it. U.S. Sup. Ct. Rule 10; *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 73 (1955). Certiorari should not be granted "except in cases involving principles . . . of importance to the public as distinguished from that of the parties." *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923). Such cases include those which concern "an important question of federal law which has not been, but should be, settled by this Court". U.S. Sup. Ct. Rule 10.1(c). The refunds sought from the State of Georgia by federal retirees for years before this Court's decision in *Davis* are significant. However, the constitutional arguments which Colonel Reich seeks to raise in this case, even to the extent properly preserved, do not warrant this Court's review, because they have been settled by this Court's prior opinions. Respondents therefore respectfully request that the petition be denied.

Respectfully submitted,

WARREN R. CALVERT
Senior Assistant Attorney General
(Counsel of Record for
Respondents)

MICHAEL J. BOWERS
Attorney General

DANIEL M. FORMBY
Senior Assistant Attorney General

Attorneys for Respondents

Georgia Department of Law
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3370